

DeMuth Electric, Inc. and International Brotherhood of Electrical Workers, Local 139. Cases 3-CA-18162 and 3-CA-18401

March 30, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On August 2, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below and to adopt the recommended Order as modified.

The judge found that the Respondent did not, as alleged, violate Section 8(a)(1) of the Act by comments that its owner, John DeMuth, made about a union cap that employee James Price wore to work. Although we adopt the judge's decision in other respects,² we find merit in the General Counsel's exception to this finding. Thus, for reasons stated below, we conclude that the Respondent further violated Section 8(a)(1) by DeMuth's derogatory references to Price's union activity.³

The evidence shows that, on September 20, 1993, Price wore a cap to work bearing the insignia of Electrical Workers Local 139. During the conversation that

followed, which Price tape recorded, DeMuth inquired as to whether Price was affiliated with that Union.⁴ When Price replied that he was not,⁵ DeMuth asked where Price had gotten the cap. Price said that Keenan Eagen, a union official, had given him the cap about 8 months ago.⁶ DeMuth then asked if Price thought it was appropriate to wear the cap "around here." Price responded, "Yeah, do you? Do you?" DeMuth answered, "No, I don't." Thereafter, DeMuth reiterated that he "just [didn't] think it's appropriate" for Price to wear the union cap on the job. On conclusion of the discussion, Price asked if DeMuth was saying that Price could not wear his union cap. DeMuth denied having said this and that Price should use his best judgment about wearing the hat. Price then left for the jobsite wearing his union cap.

It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). The Board has held that, in the absence of "special circumstances," the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act. See, e.g., *Ohio Masonic Home*, 205 NLRB 357 (1973), enf'd. mem. 511 F.2d 527 (6th Cir. 1975). Here, DeMuth's comments that Price's wearing of the hat was "inappropriate" suggest that Price could suffer adverse consequences or unspecified reprisals unless he removed the "inappropriate" cap. Although DeMuth did not specifically prohibit Price from wearing the hat, DeMuth's message was clear that Price risked employer retaliation if he did so. Therefore, we find that this conduct interfered with the rights of the Respondent's employees to engage in Section 7 activities.⁷ Because the Respondent has failed to show that special circumstances justified DeMuth's remarks, we conclude that the Respondent has violated Section 8(a)(1) by questioning the propriety of Price's wearing the union cap at work.⁸

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Member Stephens adopts the judge's dismissal of the complaint allegation regarding the Respondent's refusal to reinstate employee Price because he agrees with the judge that Price's departure from the job on September 20, 1993, was not a concerted action amounting to a strike. In particular, Member Stephens notes that Price never sought to enlist the support of any fellow employee in his departure from the job, did not suggest that he was protesting the treatment of any other employee, did not leave in protest of a collective-bargaining agreement violation (there was no such agreement), and took his action against the wishes of the labor organization for which he had originally intended to organize.

³ In finding that the Respondent's conduct was unlawful, we find it unnecessary to pass on the judge's finding that, because Price obtained employment with the Respondent for the purpose of organizing its employees, he "could not himself really be coerced by anything that DeMuth did or said." We stress, as did the judge, that other employees were present during this conversation and that, therefore, DeMuth's coercive statements to Price interfered with their Sec. 7 rights in any event.

⁴ We adopt, *inter alia*, the judge's finding that the Respondent's inquiry about Price's union activities constituted a coercive interrogation violating Sec. 8(a)(1).

⁵ Although Price engaged in organizing activities on Local 139's behalf, he actually was a member of Electrical Workers Local 241.

⁶ The judge, as the General Counsel noted, incorrectly stated at one point that Price had received the cap from Eagen the previous weekend. We find that correction of this error is immaterial to our disposition of the issue.

⁷ Member Stephens agrees that DeMuth's questions and comments regarding the cap were coercive given the context of the other threats made by DeMuth that day.

⁸ In reaching this conclusion, we disregard the judge's attempt at fn. 10 of his decision to diminish the importance of this issue, as well as other complaint allegations, by noting that the Union failed to describe with specificity these matters on filing the initial charge alleging unfair labor practice violations.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3(d) and reletter subsequent paragraphs accordingly.

“(d) Threatening employees with unspecified reprisals for wearing union insignia.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, DeMuth Electric, Inc., Elmira, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraph accordingly.

“(d) Threatening employees with unspecified reprisals for wearing union insignia.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about their union sympathies, activities, and affiliation.

WE WILL NOT threaten our employees with discharge if they speak with other employees about joining the Union at our office or between the hours of 8 a.m. and 4:30 p.m., while maintaining no prohibition against other forms of communication or solicitation between employees at the office or at the times specified, and by not excluding lunchtime and breaktime from the prohibition.

WE WILL NOT threaten our employees with discharge if any union representative appears on the premises of any job on which we are performing work.

WE WILL NOT threaten our employees with unspecified reprisals for wearing union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DEMUTH ELECTRIC, INC.

Rafael Aybar, Esq., for the General Counsel.

John DeMuth, pro se, of Elmira, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed by International Brotherhood of Electrical Workers, Local 139 (Union or Local 139) in Case 3-CA-18162 on October 12, 1993,¹ and in Case 3-CA-18401 on February 22 and April 4, 1994, the Regional Director for Region 3 has issued an order consolidating case, amended consolidated complaint, and notice of rescheduled hearing (complaint) against DeMuth Electric, Inc. (DeMuth or Respondent). The complaint alleges that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Respondent filed a timely answer in which, inter alia, it admits the jurisdictional allegations of the complaint.

Hearing was held in these matters in Elmira, New York, on June 8 and 9, 1994. A brief was received from the General Counsel on June 14, 1994. Based on the entire record, and my observation of the demeanor of the witnesses, and after consideration of the brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Elmira, New York, and has at all material times been engaged as an electrical contractor performing residential and commercial work in the construction industry. Its answer to the complaint admits that during 1993, it provided services valued in excess of \$50,000 for Laprino Foods, an enterprise directly engaged in interstate commerce. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated the Act by, on September 20:

a. Interrogating an employee about the employee's union membership, activities, and sympathies.

b. Threatening an employee with discharge if the employee engaged in union or concerted activities, such as talking about a union with fellow employees or union organizers or wearing clothing with the name of the Union on it.

c. Discontinuing its practice of allowing its employee, James Price, the use of a company truck because Price joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

The complaint further alleges that Price commenced a strike on September 20, caused by Respondent's alleged unlawful activity as set forth above. It alleges that on January 7, 1994, Price made an unconditional offer to return to work, and since January 10, 1994, Respondent has refused to reinstate Price to his former position even though it continues to utilize employees of a temporary help agency.

¹ All dates are in 1993 unless otherwise noted.

A. Events Leading to the September 20 Confrontation

James Price is a journeyman electrician and is currently a member of IBEW Local 241, Ithaca, New York. He has been a member of one IBEW local or another since 1972. During his career as an electrician, Price has from time to time assisted the IBEW in organizing attempts by “salting” or becoming an employee-organizer for the Union with various nonunion contractors. Under an agreement reached with Local 139 Organizer Keenan Eagen, Price sought employment with Respondent for the purpose of organizing Respondent’s employees. In February or March, he had just finished a salting assignment at another company and asked Eagen if there was another such job Eagen wanted performed, and Eagen directed him to DeMuth. According to Price, he received no compensation for his salting activities from the Union.

According to Price, he applied for work with Respondent in March, by stopping by Respondent’s office and asking for an application. He filled out the application there and returned it to a secretary in the office. She said it would be kept on file. Price testified that, thereafter, he phoned several times and stopped by once in an attempt to secure employment. He testified that he spoke with Respondent’s owner, John DeMuth, several times and was told by DeMuth that he was interested in hiring Price and they discussed wages. Price let the matter go at the time, but again contacted DeMuth in August. At that time, they again discussed wages, Price said he was moving to the Elmira area, and they agreed that Price would start to work for DeMuth. According to Price, DeMuth mentioned that his company had some “rate” work, that is, work at union wage levels. The other work he had was at a lower rate. Price admitted that the major disagreement between himself and DeMuth about employment was DeMuth’s wage rate. Price also admitted that DeMuth asked him nothing about union affiliation while interviewing for employment with Respondent.

DeMuth’s secretary testified that the first time Price contacted the Company was on May 4, when he stopped by the office and left a resume. He called DeMuth about employment on May 17, and he again called on May 25. Price admitted in later testimony that he was incorrect with respect to the date he first applied for work, agreeing with the May 4 date for leaving his resume with Respondent. On July 29, DeMuth referred Price to Corning Community College, which was in the process of hiring an electrician. There is no indication whether Price followed up on this job opportunity.

According to Price, he did not tell DeMuth he was a member of the IBEW and did not disclose this fact on his application form. He testified that none of the references listed on the form are affiliated with a union. He admitted that DeMuth did not ask about his union affiliation or sympathies during any preemployment interviews or discussions they had. Price testified that he had a number of discussions with Eagen prior to being hired by DeMuth. These discussions centered around speculation about Price’s chances of gaining employment there. During the summer, Price was employed by another company, Turner Refrigeration, at a higher rate of pay than offered by DeMuth.

On or about September 3,² Price told DeMuth that he was having marital problems and wanted to relocate and would accept DeMuth’s wage offer of \$10 per hour. They agreed that Price would start work on September 7. On September 7, Price filled out an application form and other personnel forms necessary for employment at DeMuth. Among the forms was one that stated that an employee of DeMuth must have a drivers license and a means of transportation. It also states that uniforms are provided for employees and they are to be on the job ready to start work at 8 a.m. On September 8, rather than beginning his new employment, Price called DeMuth and asked that the starting date for work be postponed because of personal problems.

Price went to work for Respondent on September 13 as a journeyman electrician, working from 8 a.m. to 4:30 p.m., with a half hour lunch at noon. The job he was assigned was the electrical wiring involved in the renovation of a lawyer’s office. Price began this project and worked alone on it. During the week he worked for DeMuth, John DeMuth visited the jobsite on at least two occasions. Respondent provided him with a company van containing materials and tools for the project to use to go to and from the jobsite. According to Price, when he was hired, DeMuth told him that he would be assigned a company vehicle to carry supplies and he would not have to use his private vehicle for hauling equipment and supplies. Price believes that all Respondent’s electricians are supplied company vehicles. On cross, this was amended by Price’s testimony that on September 13 John DeMuth told him to take a service truck to the job to get started because they were already behind on the job because Price did not begin work on September 8 as planned. He also assigned the van to Price because DeMuth did not know what areas carpenters would be working in and the van had ample materials and tools to begin work wherever they were.

With respect to the matter of assigning vans, another employee of Respondent, Lance Wattles, credibly testified that all DeMuth’s employees are not assigned vans, though Respondent has at least as many vans as employees. Wattles testified that he asked DeMuth if he could use a van until he acquired a second vehicle and was granted this privilege. He also testified that the van used by Price was a service vehicle used to begin a job when there is a need to accumulate tools and materials for the job.

Price testified that he usually arrived at DeMuth’s office between 7 and 7:30 a.m., got the van and left for the jobsite at 8 a.m. Some other employees also came in to the office at this time and left for their assigned jobs at about the same time. During the time he was at the office, he would gather tools, equipment, or supplies needed for the day’s work and put them in the van. During the 1 week he worked on the project, he would arrive there at about 8:10 a.m. Price testified that he spoke with other employees about the Union and about social topics while at the office.³ According to Price, he was never told that he could not engage in social conversations with other employees while at the office or be visited by social acquaintances while on the jobsite. On this

² As noted above, Price originally testified that this event occurred in August, but amended the date on cross-examination.

³ The record conclusively establishes only that Price spoke to one employee, Lance Wattles, on one occasion, September 20, about the Union.

point Wattles testified that he usually arrived at the office about 7:30 a.m., gathered materials, and left for his jobsite either immediately or at about 7:40 a.m. He has been warned by DeMuth in the past to be at the jobsite by 8 a.m. and had been verbally disciplined by DeMuth when he failed to do so. Therefore, crediting Wattles, I find that Respondent had an enforced, existing policy requiring employees to be at the situs of their work by the 8 a.m. starting time.

On the other hand, prior to the events in question, the Respondent had no company rule which would prohibit social conversations between employees during working time so long as the conversations did not hurt other employees. DeMuth cited the example of a type of conversation he prohibited being one when one employee makes comments about another's spouse. No employee has been disciplined for engaging in a social conversation with another employee on worktime. DeMuth also had no policy prior to September 20 prohibiting employee conversations at the office before or after work, or while working there.

During the first week of his employment with DeMuth, Price wore a baseball cap to work bearing a golf logo and was not told that the cap was in any way inappropriate. Respondent does not have a policy prohibiting the wearing of personal caps, though it does provide a uniform and requires the uniform be neat.

On the weekend before September 20, Eagen gave Price a cap with a union logo and a pocket size tape recorder. According to Price, he and Eagen wanted to tape Price's conversations with employees and DeMuth's reaction to his activity. Specifically, Price and Eagen wanted to see if DeMuth would engage in unfair labor practices. He agreed with DeMuth's characterization that his intent on September 20 was to "bait" DeMuth into violating the Act. In my opinion, Price unconvincingly denied that going on strike was prearranged. It had been prearranged that Eagen would meet Price for lunch on September 20. Upon meeting Eagen for lunch, Price informed DeMuth by phone that he was going on strike and thereafter he and Eagen spent the afternoon listening to the tape Price had made that morning.

Price went to DeMuth's office on this morning at his usual time and upon arriving, began taping. He first spoke with one of DeMuth's other employees about the advantages offered by the Union. A little later, he played with DeMuth's dog, and then DeMuth showed up. A transcript of the tape follows:

Price: Hi. How you doing?
 Worker: Good, you?
 Price: Not bad.
 Worker: Good.
 Price: So, where is everybody.
 Worker: Hell if I know.
 Price: You the first one here.
 Worker: Yeah, usually am.
 Price: Sure is.

Worker and Price are inaudible for a few seconds, then,

Price: Well, I think we have the stuff here. Let me ask you a question.
 Worker: Yes, sir.
 Price: What do you think about joining the union?
 Worker: Hey?

Price: What do you think about joining the Union?

Worker: What do I think about joining the Union?⁴

Price: Yeah.

Worker: Well, they're after me.

Price: I'm a union member, did you know that?

Worker: No, I didn't.

Price: Yes.

Worker: Keenan Eagen told me, oh, several times.

Price: Tell you what. Let me tell you something, Keenan Eagen, there's work out there and the right to work out there, you can collect your unemployment without having to look for a job (inaudible) and it's better working conditions.

Worker: What do you mean by that?

Price: Well, you get to change around from different jobs. You're not always working for the same contractor.

Worker: Well, do you know—I don't know much about union at all. What Keenan told me, that's about all I do know.

Price: Okay. Losing your job if he told (inaudible) they'd probably get . . .

Worker: No, I mean, he knows what the union told me and, I don't know, (inaudible) pretty much all he has for a year.

Price: Okay, It's something you should think about so . . . you're working on or whatever it is?

Worker: No, well maybe.

Price: Maybe?

Worker: Yeah. Working forward to (inaudible) another job, more secure.

Price: Got to work Saturday.

Worker: Yeah, I work Friday nights, all day Saturday.

Inaudible passage of a few seconds.

Price: Steel, hey?

Worker: What's that.

Price: Steel, hey?

Worker: Yep.

Price That's not cheap, is it?

Worker: No.

Price: What's he do with the scrap.

Worker: I have no idea (inaudible) stockroom.

Price: Plays and talks with Dexter the dog.

There is a pause in the tape and then,

DeMuth: Do you have any affiliation with IBEW Local 139?

Price: No, I don't.

DeMuth: You don't, huh?

Price: No.

DeMuth: Where did you get the hat?

⁴The employee with whom Price was speaking was electrician Lance Wattles. Wattles testified, inter alia, that he has informed DeMuth that he had been contacted on a number of occasions by the Union. DeMuth has informed him that he is not interested and cannot comment or respond. He testified that the fact that he may be involved in union activities has not affected his job in any manner.

Price: Keenan Eagen gave it to me . . . about 8 months ago.

DeMuth: Do you think it's appropriate to wear it around here?

Price: Yeah, do you? Do you?

DeMuth: No, I don't.

Price: You don't want me to wear it?

DeMuth: Jim, I'm going to tell you something.

Price: Okay.

DeMuth: We're not represented by that operation.

Price: Uh huh.

DeMuth: Are you represented by that operation.

Price: I'm not represented by them, no.

DeMuth: Okay, I just don't think it's appropriate. Do you know what a plant is, Jim?

Price: What's a plant?

DeMuth: Do you know what a plant is?

Price: Do I know what a plant is? No, what is a ? as a manufacturing plant or . . . ?

DeMuth: (inaudible) Um, what do you need over there for tools, materials, and everything else.

Price: Drill, um, sawzall, extension cord, ladder.

DeMuth: There's a sawzall there.

Price: I've got a sawzall in the truck.

DeMuth: No you're not taking the truck.

Price: So what do you want me to take?

DeMuth: (inaudible)

Price: My car?

DeMuth: Yeah.

Price: Am I going to get paid to use my car?

DeMuth: No, you're not getting paid to use your car. (inaudible)

Price: Would you mind before 8 o'clock if I talked to your guys about joining a Union?

DeMuth: Yeah, I do.

Price: I can't do that?

DeMuth: No, you can't do that. You want to talk about the Union, do it someplace else. You understand me?

Price: I understand you.

DeMuth: You don't have any affiliation with the Union?

Price: I didn't say that. I have no affiliation with 139.

DeMuth: You told me you didn't have any affiliation. . . .

Price: with 139. No, I don't have any affiliation with 139. I'm a member of 241.

DeMuth: That's cool, that's cool. Jim, that's real good. You come in here to disrupt my operation. I'm gonna tell you something, I'll tell you right in front of these guys right here, you talk Union on my job between 8:00 and 4:30, you're fired.

Price: I won't do that.

DeMuth: You're damn right you won't. I see a representative of any local Union on my job, you're fired.

Price: You won't see that either.

DeMuth: I'd like to see you in the office, Jim.

Price: Sure.

DeMuth: Let's go out to my truck. What else do you need, Jim? Drill. . . .

Price: Sawzall, 6-foot ladder

DeMuth: Yep, Sawzall's right here.

Price: (inaudible)

DeMuth: What else, Jim?

Price: That should do me. After you sir.

DeMuth: Go ahead. You work here. You do as your told. Were you sent by the local Union to organize this Company?

Price: Was I sent here by the local Union to organize this Company?

DeMuth: Were you asked by the Union to go to work for DeMuth Electric in any way, shape, manner or form, so you could help organize this company?

Price: Yes.

DeMuth: You were, huh?

Price: Uh huh.

DeMuth: Do you realize there are laws against that.

Price: I don't know of any laws against that.

DeMuth: Uh huh. Let me tell you something, Jim. You came in here and said, ah John you work with me, I got personal business to do, I got this, I got that.

Price: Uh huh.

DeMuth: You're asking me to be a real nice guy and you come in here and try to disrupt my operation.

Price: I'm not trying to disrupt your operation.

DeMuth: Yes, you are, Jim.

Price: I'm trying to help your operation.

DeMuth: My operation doesn't need your help.

Price: I'm just trying to help you.

DeMuth: I don't need your kind of help, Jim. Don't need it whatsoever.

Price: Okay.

DeMuth: Your organization with whom you're affiliated can't compete in the marketplace. They cannot compete in the marketplace. Do you understand me? Cannot compete. The reason they're here is because they can't compete in the marketplace. Because they feel that they need people. They need people real bad, Jim. The International is burning all that God damned money and they need per capita. That's what's happening.

Price: John, I don't think that is.

DeMuth: No, you don't think so, huh. Well I'll tell you what, you go to Local 139 and you open up the books.

Price: Uh huh.

DeMuth: Open up the books. Get real deep into the books and you're going to find they're operating in the red. The only way they're operating in the black is because they're taking all the money out of the pension, the money that came out of the pension funds of all the hard-working members who paid for our God damn operation of the Local.

Price: So you think they're stealing money from people?

DeMuth: Exactly, that's illegal, that's illegal.

Price: Cause if you think they're stealing money from people, that's really something. I don't think they would do that at all.

DeMuth: You don't think they're taking money out of your pension, money . . . income out of your pension fund

Price: To run their Local?

DeMuth: To run their Local.
 Price: No, I don't believe they'd do that.
 DeMuth: I bet you thousands of dollars they are Jim, because they can't operate. . . .
 Price: We're just here to help you, John.
 DeMuth: What kind of help do you think I need here, Jim?
 Price: We can give you a vast amount of people.
 DeMuth: You can't give me anything.
 Price: A labor pool. . . .
 DeMuth: I'm going to tell you something. I was a member of this Local. Do you realize I was a (inaudible) of this Local?
 Price: How come you left?
 DeMuth: Because, I had to go to Washington, D.C. because they didn't have competent enough people in this Local. I had to take the God damn Local to Court because they didn't have the competency. I was on the Executive Board. I was on the Apprenticeship Committee. I was on the negotiating Committee. I was involved very very heavily in this Local, Jim. You don't know anything about it. You know who hired Keenan Eagen? You know how Keenan Eagen got his job?
 Price: How'd he get his job?
 DeMuth: He got his job because I was on the Apprenticeship Committee.
 Price: Is he a good man?
 DeMuth: No, he's not a good man.
 Price: Does he know his stuff?
 DeMuth: No, he doesn't know his stuff.
 Price: I'm sorry to hear that. I thought he was a good man.
 DeMuth: What you think?
 Price: How about Charlie Patton?
 DeMuth: What do I think about Charlie Patton? Charlie Patton turned around and f—ked the best guy who taught him everything he knows, went and f—ked him right in the back. Have you ever heard a guy by the name of ah, of ah, former Business Agent, Joe ah, did you ever meet Joe ah, (inaudible). Did you ever meet him?
 Price: No.
 DeMuth: Joe taught this guy everything he knows. Joe was the Business Agent. Charles had been the Assistant Business Agent for years.
 Price: Uh huh.
 DeMuth: Joe ran four years ago. Three or four years ago before he retired.
 Price: Right.
 DeMuth: Charlie Patton ran against him as Business Agent. Charlie Patton was the Assistant Business Agent. Joe was going to retire before his term was up, but if he had been re-elected. . . .
 Price: Uh huh.
 DeMuth: As Business Agent. Charles as the Assistant Business Agent, Charles Patton would have been the Business Agent.
 Price: Okay, I understand you.
 DeMuth: (inaudible) the quality of people you have
 Price: Do you think. . . .
 DeMuth: Representing

Price: Do you think of all the people in that Local there's no one qualified that could come out and work for you?

DeMuth: The qualified people are employed. On a regular basis by those What . . . what. . . . You told me I could . . . I . . . you're going to give me a labor pool. What kind of labor pool are you going to give me, the six guys that left here? (inaudible) That's the kind of labor pool you're gonna give me?

Price: Why? They weren't any good?

DeMuth: That's the kind of labor pool you're gonna give me? The guys (inaudible)

Price: But were they any good?

DeMuth: Do I want people without loyalty working for me? I don't give a shit what they're affiliated with. Do I want them working for me? Absolutely not. Absolutely not. Absolutely not, Jim. I don't want, I don't want

Price: I'm loyal.

DeMuth: Loyal to what?

Price: The Union.

DeMuth: Loyal to the Union, huh?

Price: Yes, and I'll do a good job for you. I've been doing a good job for you.

DeMuth: Sure.

Price: So, I've been doing a good job for you.

DeMuth: You will?

Price: That's right, I will.

DeMuth: And next week, you'll want how much an hour, Jim?

Price: Well I think that you should be paying me the proper rate. Don't you?

DeMuth: No I don't Jim because its not competitive in the marketplace. Its real simple.

Price: And I think you could make any money paying Union wages.

DeMuth: I've been in the Union and I know I can't. I cannot be competitive in the marketplace.

Price: Then how does everybody else do it?

DeMuth: How does everybody else?

Price: There's other contractors in Ithaca and in. . . .

DeMuth: Let's look at Elmira first.

Price: In Elmira.

DeMuth: Let's look at Elmira first. Let's not go to Ithaca and and let's go to Elmira first.

Price: Okay. Let's go to Elmira.

DeMuth: Let's go to Elmira.

Price: Is anybody doing any work in Elmira making any money?

DeMuth: Where's the work? Where are they getting the work?

Price: In the Union. (inaudible)

DeMuth: Where are they getting the work? Exactly where are they getting the work?

Price: Exactly where?

DeMuth: Yeah where?

Price: They're getting work in town aren't they?

DeMuth: Where's their customers.

Price: I don't know who all their customers are.

DeMuth: Let me know a customer.

Price: I don't know all the customers.

DeMuth: (inaudible)
 Price: I know a customer, Tops.
 DeMuth: Tops?
 Price: Tops out there at that strip mall. Did they make any money on that job? I think they did.
 DeMuth: Who knows? They got some contract people.
 Price: They wouldn't be doing just (inaudible)
 DeMuth: (inaudible) I can't compete with a lot of contract . . . out of town contractors.
 Price: That makes you more competitive by (inaudible).
 DeMuth: Sure you're competitive. Sure you're competitive when you gotta tighten up your edges. That's not making money Jim.
 Price: John, we're really trying to help you.
 DeMuth: You're not helping me a God damn thing.
 Price: We're really trying to help you. I'm not trying to hurt you.
 DeMuth: You're not helping me a bit, and you're not trying to help me.
 Price: Yes, we are.
 DeMuth: You are?
 Price: Absolutely.
 DeMuth: Good, its 8 o'clock. Pick up your tools, get over to the job and get to work. That's how you can help me.
 Price: Okay.
 DeMuth: Get over to the job and get to work. Tell me what you need.
 Price: Alright.
 DeMuth: (inaudible) to the job. You'll be on the job at 8 o'clock and you're to be there till 4:30.
 Price: It's ten to eight isn't it?
 DeMuth: You'll be on the job working at 8 o'clock.
 Price: Are there . . .
 DeMuth: Start working at 8 o'clock.
 Price: Okay, Okay.
 DeMuth: You're to be there until 4:30.
 Price: Okay. How come I don't have a van and I've had a van all this time?
 DeMuth: Because I have a van. . . . I gotta a guy I have to send it someplace else today, Jim. I asked you what you needed on the job.⁵
 Price: Alright, you mind if I go on strike at noon-time.
 DeMuth: Jim, you do whatever you damn please. That's right.
 Price: Okay, I will.
 DeMuth: Okay?
 Price: I will.
 DeMuth: You do whatever you (inaudible).
 Price: On my time I'm going to strike at twelve.
 DeMuth: You go out and you do whatever you think you wanna do, Jim.
 Price: Okay.

⁵ The evidence reflects that the van in question is the Respondent's service van and was to be used on September 20 by two other electricians to perform service work. He said that the other vans used by the Company were already assigned for use that day. DeMuth testified that the events of the morning had nothing to do with reassigning the van on September 20.

DeMuth: Get over to the job.
 Price: I'm going. I gotta get my equipment, don't I. What about a six foot ladder, you're gonna get one over there?
 DeMuth: It will be delivered. I asked you what you needed.
 Price: Okay, and a flashlight.
 DeMuth: Pick up your tools . . .
 Price: And a flashlight.
 DeMuth: Pick up your tools and go. Flashlight is a personal tool. Get your own.⁶

Wattles testified that the conversation continued past the point when the tape stopped. He testified that Price asked DeMuth if DeMuth was saying he could not wear his union hat. DeMuth responded that he did not say that and that he was saying that Price should use his best judgment. At this point Price left for his jobsite wearing the hat.

B. Conclusions with Respect to the Allegations that Respondent's Conduct on September 20 Violated Section 8(a)(1) of the Act

The complaint alleges that Respondent, acting by and through President John DeMuth, violated Section 8(a)(1) in his dealings with Price on the morning of September 20 in three ways. It alleges DeMuth unlawfully interrogated Price about his union membership, activities, and sympathies. It further alleges that DeMuth threatened Price with discharge if Price engaged in union or concerted activities, such as talking about a union with fellow employees or union organizers or wearing clothing with the name of the Union on it. Last, it alleges that Respondent discontinued its practice of allowing Price the use of a company truck because Price joined or assisted the union and engaged in concerted activities and to discourage employees from engaging in these activities.⁷

I can agree only to a limited extent with the General Counsel's assertions that the facts adduced herein prove the complaint allegations. There can be little dispute with the facts surrounding the alleged unlawful interrogation, threats of discharge and the matter of Price's union cap as the essential facts were all captured on the tape which is transcribed above. What makes this case somewhat different from most is the fact the employee involved, Price, could not himself really be coerced by anything that DeMuth did or said. His stated purpose in going to work on September 20 was to bait DeMuth into saying or doing something that constituted a violation of the Act and, I firmly believe, saying or doing something that would justify Price going on an unfair labor practice strike. I also believe that, based on Price's actions, that he had no serious intention to organize Respondent's employees for the Union, but instead, was intent upon merely harassing DeMuth and punishing him if he rose to the "bait." As the General Counsel's Exhibit 7 reflects, Price began work on a full-time job around what must be, based on the hours worked in October, the first of that month. This job paid more than \$9 more per hour than did his job at

⁶ The evidence reflects that the company flashlights are assigned to particular company vans.

⁷ This last allegation is also alleged to be a violation of Sec. 8(a)(3) of the Act.

DeMuth. I believe that based on his eagerness to part company with DeMuth and cease his up to September 20, non-existent, organizing efforts, Price was already assured of this job.

Thus, armed with his tape recorder, Price reported to work on the September 20 wearing his union cap. Upon seeing him for the first time that morning, DeMuth immediately asked Price if he was affiliated with the Union and where he obtained his union cap. He then accused Price of being a union "plant," which Price denied initially and then admitted. In the continuing conversation, Price bluntly asked if he could talk with other employees before 8 o'clock about joining the Union. DeMuth responded that he could not, that if he wanted to talk about the Union to do it someplace else (presumably somewhere other than the company office). Then in the presence of at least two of his employees, DeMuth said to Price, "you talk Union on my job between 8:00 and 4:30, you're fired." Price responded that he would not do that, and DeMuth said, "You're damn right you won't. I see a representative of any local Union on my job, you're fired."

I find that the foregoing confrontation between DeMuth and Price constitutes a violation of the Act for unlawful interrogation and the promulgation of an unlawfully broad no-solicitation rule. Although I have found that Price, because of his intent in going to work that morning was virtually immune from any coercive behavior by DeMuth, the same cannot be said for his other employees who observed the exchange. DeMuth initiated the interrogation of Price as a reaction to seeing Price's union cap. He was at least somewhat angry during the confrontation and continued to press Price about his affiliation with and mission on behalf of the Union. Such an interrogation must be said to reasonably tend to coerce, restrain, or interfere with rights guaranteed under the Act, if not so with Price, certainly with the other employees observing the interrogation. The clear message to them was overt union support would get an immediate and negative response from the Company's owner. Such an interrogation is in violation of Section 8(a)(1) of the Act. See *Litton Systems*, 300 NLRB 324 (1990); *Guille Steel Products Co.*, 303 NLRB 537 (1991); *Dennett Road Manor Nursing Home*, 295 NLRB 397 (1989); *Kellwood Co.*, 299 NLRB 1026 (1990); and *Matheson Fast Freight*, 297 NLRB 63 (1989).

I also find that the prohibition promulgated by DeMuth against speaking with employees about union matters between 8 a.m. and 4:30 p.m., and speaking with them about the union at anytime at the Company's office is discriminatory and overly broad, and thus unlawful. The Respondent did not have a rule prohibiting solicitation and allowed employees to talk about virtually anything at the office and on the job, regardless of the time, unless the conversation tended to hurt other employees. In the absence of a nondiscriminatory no-solicitation rule, and given Respondent's past practice, the prohibitions announced by DeMuth with termination the punishment for violation of the prohibitions, is clearly discriminatory. The time ban on union conversations does not make allowance for breaks or the lunch period, and the ban on such conversations at the office extended beyond working time. As such, the no-solicitation rules promulgated by DeMuth in his conversation with Price in the presence of other employees is overly broad and unlawful for this reason as well. *Ideal Elevator Corp.*, 295 NLRB 347 (1989);

Mack's Supermarkets, 288 NLRB 1082 (1988); *Our Way Inc.*, 268 NLRB 394 (1983); and *Litton Systems*, supra.

The threat to discharge Price if any representative of any local union was seen by DeMuth on his job also is unlawful. DeMuth has absolutely no control over who the owners of the property on which his company is performing work will allow on their property. A similar threat, made directly to Eagen in an earlier Board case, was found to be in violation of Section 8(a)(1) of the Act.⁸

I cannot agree that DeMuth's comments about Price's union cap violated the Act. DeMuth did say that he thought the cap was inappropriate and when asked by Price whether he could continue to wear the cap told Price to use his best judgment. He never threatened Price with any reprisal for wearing the cap and never told him he could not continue to wear it. In fact, Price never removed the cap and wore it to the jobsite after his confrontation with DeMuth. Under these circumstances, I do not find that Respondent violated the Act as alleged in the complaint by "threatening discharge . . . for . . . wearing clothing with the name of the Union on it."

I likewise cannot find that Respondent violated the Act by reassigning the company van from Price to other uses on September 20. Wattles credibly testified that employees are not routinely assigned vans and that vans are often used at the start of a job to get specific tools and materials to the job. The Company's application requires a job applicant to have his or her own means of transportation. DeMuth told Price during their conversation that he needed the van for other work. At the hearing, DeMuth gave a credible reason for the reassignment which was supported by the testimony of another credible employee, Wattles.⁹ There is nothing in the transcript of the conversation between DeMuth and Price to indicate that the decision to reassign the van was other than as stated by DeMuth, except for its timing, which under the circumstances was unavoidable. There is nothing in the record to suggest that DeMuth's refusal to pay Price mileage for the use of his own vehicle is contrary to company policy, especially when the job to which Price had to travel was only three or four blocks away. I do not believe that the General Counsel has established that unlawful motivation was behind the reassignment of the van on September 20, and to the contrary, find that DeMuth had a reasonable business reason for so doing. Price did not continue his employment with DeMuth to learn if the van was permanently reassigned or just temporarily assigned for the day.¹⁰

⁸*DeMuth Electric, Inc.*, 3-CA-17527, JD issued September 29, 1993, and made the Order of the Board on November 30, 1993, by virtue of Respondent's failure to file exceptions to Judge's Decision.

⁹I found witnesses John DeMuth, Sandra Bertelsen and Lance Wattles to be credible witnesses. Despite finding that DeMuth violated the Act in certain regards, I did not believe that he was lying or otherwise knowingly distorting the facts. Wattles had no reason to give other than truthful testimony and appeared truthful throughout his appearance. Price on the other hand gave demonstrably inaccurate testimony on a number of points. He also demonstrated a very selective memory which seriously brings into question his credibility. Wherever the testimony of DeMuth and Wattles is in conflict with that given by Price, I credit the testimony of DeMuth, Wattles and the company secretary, Sandra Bertelsen.

¹⁰Reference to the charge filed in this case makes no complaint about Respondent's actions with regard to the union cap, the flashlight, or the reassignment of the van. It does specifically complain

*C. Facts Relating to the Alleged Unfair Labor Practice
Strike by Price on September 20*

Price left the office of Respondent after the above-transcribed conversation and worked at the jobsite until about five past noon. He testified that he was visited at the site by DeMuth who brought him some materials. When he left at noon, he called DeMuth and informed him that he was going on strike. He gave DeMuth no reason for his actions though specifically asked to do so by DeMuth. According to Price, he went on strike because of his conversation with and treatment by DeMuth that morning. "He told me that I could not take the company van, he told me that if I talked to any employees about the union, he would fire me, if I talked to—if anybody from the union came out to see me, he would fire me and he told me I could not have a flashlight to work in the basement where it was dark and dangerous and I was—that was the reasons I went on strike."¹¹ At a later point he testified that he reported to the jobsite that morning rather than going on strike immediately to see if DeMuth would come to the job and harass him or fire him. When that did not happen, he went on strike at noon. He was met at that time at the jobsite by Eagen and the two men went directly to the Union's office and that afternoon played the tape Price had made earlier.

That same day, DeMuth sent Price a letter, which Price admits receiving. The letter reads:

At 12:30 P.M. this day, you called the office and said you are going on strike. I stopped by the job location you were working on at approximately 1:30 P.M. and you were not there. Will you please advise as to the reason you are on strike. You are expected to come to work and be on the job ready to begin work at 8:00 A.M. daily and work until 4:30 P.M. allowing a 1/2 hour for lunch from 12:00 to 12:30 P.M. Please report to work immediately as indicated above or advise as to your reasons for your absence.

To date, Price has not replied to this letter, nor has he spoken with DeMuth, other than during this hearing. He testified that he did not respond because he talked to the Union and it was determined that it was not "prudent" to respond. On December 31, he did write to DeMuth the following letter:

I am ending my strike, I am making an unconditional offer to return to work. Please advise me when and where to report."

of DeMuth's interrogation of Price and his threats of discharge, however. I believe that their omission from the charge is indicative of the importance Price gave these actions at time of their occurrence, his testimony at the hearing notwithstanding.

¹¹ General Counsel asserts that denying Price the use of a company flashlight on September 20 is a separate violation of the Act. This was not alleged to be a violation in the complaint and no amendment to the complaint was offered by the General Counsel. Thus, I will not find that DeMuth's actions in this regard are unlawful as he was not put on notice that he had to defend this action. I would note that no one contradicted DeMuth's statement that a flashlight was a personal tool, to be supplied by the employee as are a number of other tools.

DeMuth has not reinstated Price, nor has he hired any employees since the date of Price's letter, which Respondent received on January 10, 1994. DeMuth contended during the investigation stage of this case that he considered Price to be a voluntary quit. At the trial, DeMuth seemed to agree that Price was on strike, but that he did not have enough business to allow him to reinstate Price. I do not find it really significant that DeMuth may be confused as to Price's legal status as he is not a labor attorney and represented himself in this proceeding.

Price testified that he called DeMuth's office in January and asked the office secretary if he could speak with John DeMuth. He also said he was willing to come back to work and could DeMuth tell him when and where to report. The secretary said DeMuth was not in. According to Price, he received no response to this phone call. He has made no effort to contact the Respondent since that date. Price admitted to working for other companies during the period from September 20 to December 31, and thereafter. The General Counsel's Exhibit 7 reflects that Price found work almost immediately and worked almost full time thereafter for several employers at a rate of pay substantially higher than he was receiving at DeMuth. For example he worked full time for Cornell University in Ithaca, New York, beginning in October.

DeMuth's secretary credibly testified that Price did not call in January or thereafter about reinstatement. I credit her denial of Price's testimony in this regard. She also testified that Respondent has had several inquiries about employment from journeyman electricians since January 10, but has hired no one. Respondent did hire two electrician's helpers in November, one of whom was discharged before December 31 and the other, Paul Herbert, who is still employed by DeMuth. DeMuth testified that the job for which Price was hired was completed in November, by shuffling other employees. Since the completion of that job, he has not needed another electrician.

A comparison of Herbert's application form with that of Price reveals that Price possesses many more job skills than does Herbert. For example, Price indicated that he understood control transformers, step-down transformers, buck boost transformers, primary/secondary transformers, motor control starters, control wiring, limiter switches, photo eyes, temperature control wiring, basic function of unit heaters, basic function of HVAC, high/low cutouts, damper motors, and controls; whereas, Herbert did not understand these skills. The majority of work performed by Herbert is what Respondent calls shop duties, which includes maintenance, cleanup in the shop, and delivery duties. DeMuth elaborated that Herbert cleans and repairs tools and materials, and delivers equipment and tools to jobs. On occasion, he will assist a company electrician in performing his tasks. To a far lesser degree, the Company's electricians also perform shop duties.

Wattles characterized Herbert as shop help or a shop man. He also testified that Herbert goes to jobs occasionally and assists electricians in the performance of their work and pursuant to their supervision. Such tasks involve installing conduit, pulling wire, and installation of lighting fixtures, all tasks described as basic and performed regularly by the Respondent's electrician employees.

D. Was Price Engaged in a Strike and Does Respondent Have Any Obligation to Reinstate Price

I have found above that Respondent committed certain unfair labor practices in violation of Section 8(a)(1) of the Act. Price contends that he went "on strike" because of these acts and others, which I have found not to be unfair labor practices. As I have indicated above, from all the circumstances, I believe that Price's intent to strike or at least leave the employ of DeMuth on September 20, was made before he reported for work on the September 20, and I believe it is reasonable to infer that this intent was formed in large part by the prospect of a better paying job elsewhere. On the other hand, I believe that the unfair labor practices committed by DeMuth gave Price an excuse to call his leaving a strike and were thus, at least partly, the cause of the "strike," if indeed Price's leaving at noon can be properly characterized as such.

Was Price on strike or did he simply quit his employment with DeMuth? Webster's defines a "strike" as (a) a work stoppage by a body of workers to enforce compliance with demands made on an employer, or (b) a temporary stoppage of activities in protest against an act or condition.¹² I find it impossible to find that Price's actions fit either common definition of a strike. Leaving aside the fact that he did not act in concert with any other employees, he made no demands nor did he protest at the time he went on strike or thereafter. Price did not go on strike immediately after the unfair labor practices were committed. Instead, he worked 4 hours to see if DeMuth would take any other actions against him, and when that did not happen, called in and said he was on strike. When asked by DeMuth why he was going on strike, Price gave no answer. He likewise did not answer DeMuth's letter asking him to return to work and/or explain why he was on strike.

Price and the Union jointly decided not to reveal the nature of and reasons for the strike to either DeMuth or DeMuth's employees. Both the strike itself and Price's refusal to state why he was on strike directly refute Price's stated objective in working for Respondent, that is, to organize the work force. By going on strike, he removes himself from the work force, and there is no evidence that he thereafter contacted any employee of DeMuth about anything. Without notice of the reasons for the strike, the employees cannot be apprised of any alleged unlawful or unfair practices by DeMuth which might sway their sympathies in favor of the Union. On the other hand, such a refusal has much to do with harassing DeMuth, which I believe was Price's main intent.¹²

Organizing Respondent's employees is a legitimate and lawful objective of the Union. However, I cannot see how Price walking off the job without explanation in any way furthers that objective. He is not only no longer in a position to organize, but is not giving DeMuth an opportunity to correct the errors in his understanding of the law. He is simi-

larly not giving the employees of DeMuth any notice that there is something unlawful or unfair about the way DeMuth conducts labor relations. The only purpose I can discern is that leaving gives Price the freedom to take a better job. He or the Union could have filed the same charges with the Board as were filed if DeMuth failed to respond to a demand that he cure his unlawful actions. Choosing to file charges with the Board rather than picketing or even telling DeMuth what the strike is about is certainly Price's and/or the Union's choice. However, I believe the choice made under the circumstances of this case also directly affects the remedy sought by Price and the Union.

This is so because I believe that their actions give credence to Respondent's initial view that Price was a voluntary quit rather than a striker. He did not picket, he did not explain why he was on strike, he did not ask to negotiate differences and he did not contact Respondent for over 3 months. On the other hand, he did take full-time employment in his line of trade in a town some 30 miles from Elmira, and thereafter remain almost fully employed, at scale wages. Any objective view of his actions poststrike would lead one to believe that he had either voluntarily quit his employment with DeMuth or had abandoned his strike, if he was in fact on strike. Under these circumstances, I do not find that Respondent had a duty to reinstate Price when he made his offer to return to work in January 1994.¹³

I would have no hesitation in invoking the full range of remedies against DeMuth had he been given any opportunity by Price or the Union to rectify his mistaken actions of the morning of September 20 by giving him notice of the purpose of Price's "strike." Having refused to do so, I do not believe that Price and the Union are acting in good faith with respect to DeMuth or the Board, nor do I believe that it effectuates the policies of the Act to accord Price the rights of an unreinstated unfair labor practice striker. Price's action in refusing to explain the purpose or cause of the strike was taken purposefully by Price and the Union, with full knowledge of their rights and ability to publicize their dispute with DeMuth.¹⁴ Such action does not promote stability in the workplace or foster harmony between employer and employee, nor does it aid the employees in exercising their rights under the Act.

Therefore, for the reasons stated, I find that Price voluntarily quit his employment with Respondent on September 20, or by his conscious refusal to provide Respondent with the reasons for his "strike," and by taking a full-time job elsewhere shortly after September 20, has abandoned the strike, and thus waived his right to reinstatement as an unfair labor practice striker. I would dismiss those portions of the

¹² The Union had filed about eight charges against DeMuth, several of which were withdrawn on advice of the Region. Many of these charges concerned DeMuth not hiring electricians directed by Eagen to file applications for employment with DeMuth. As noted above, except for electrician's helper Herbert, DeMuth has hired no one since September 20, who remained on the payroll past December 31.

¹³ Though in the context of determining eligibility to vote in representation election, the Board has found under similar facts that a striker has abandoned his employment and resigned his position. See *Belt Supermarket*, 260 NLRB 118 (1982).

¹⁴ I am aware of a line of Board cases wherein unrepresented employees who engage in a brief concerted and protected walkout do not give up their rights because they do not give notice of the purpose of the walkout to the employer. I do not believe these cases are in point herein as Price is in effect represented by the Union and the Union was a party to the decision not to inform DeMuth about the reasons for the strike. These cases also do not involve strikes.

complaint alleging that Respondent's failure to reinstate Price violate the Act.¹⁵

CONCLUSIONS OF LAW

1. DeMuth Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act by:

a. Coercively interrogating its employee, James Price, in the presence of other employees about his union sympathies, activities, and affiliation.

b. Threatening its employee, James Price, with discharge if he spoke with other employees about joining the Union at the Respondent's office or between the hours of 8 a.m. and 4:30 p.m., while maintaining no prohibition against other forms of communication or solicitation between employees at the office or at the times specified, and by not excluding lunchtime and breaktime from the prohibition.

c. Threatening its employee, James Price, with discharge if any union representative appeared on the premises of any job on which Respondent was performing work.

d. The unfair labor practices that Respondent has been engaging in are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

e. Respondent did not engage in the other unfair labor practices alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it is recommended that it be Ordered to cease and desist therefrom and post appropriate notice.¹⁶

¹⁵ In the event the Board disagrees with this view on appeal and finds that Price was an unfair labor practice striker with the reinstatement rights attendant to that status, he would have been entitled to immediate reinstatement to his former position in January 1994. Respondent did not meet its burden of showing a business justification for not reinstating him at that time. It continued to employ its electrician's helper, Herbert, who was hired after the strike began. Herbert, though clearly not an electrician of Price's caliber, does perform work formerly performed by Price and regularly performed by the other electricians employed by DeMuth. Such work includes basic electrical tasks as well as shop work. The full time work performed by Herbert is the same as or similar to the work performed by Price. Given this fact, Respondent cannot validly claim lack of business for its reason for failing to reinstate Price. If Price is entitled to reinstatement as an unfair labor practice striker, then Respondent's refusal to immediately reinstate him upon receipt of Price's unconditional offer to return to work is unlawful. See *Hydrologics, Inc.*, 293 NLRB 1060 (1989); *Robert G. Andrew, Inc.*, 300 NLRB 444, 457 (1990).

¹⁶ In the event that the Board, on appeal, finds that Price was an unfair labor practice striker and that Respondent unlawfully refused to reinstate him upon receipt of Price's unconditional offer to return to work, I would recommend in that circumstance that Respondent be ordered to offer Price immediate reinstatement to his former position, discharging if necessary, any employee hired to replace him and make Price whole for any loss of wages or benefits he may have suffered by virtue of Respondent's unlawful failure and refusal to reinstate him, with backpay commencing from January 10, 1994, to

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, DeMuth Electric, Inc., Elmira, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union sympathies, activities, and affiliation.

(b) Threatening its employees with discharge if they speak with other employees about joining the Union at the Respondent's office or between the hours of 8 a.m. and 4:30 p.m., while maintaining no prohibition against other forms of communication or solicitation between employees at the office or at the times specified, and by not excluding lunchtime and breaktime from the prohibition.

(c) Threatening its employees with discharge if any union representative appeared on the premises of any job on which Respondent was performing work.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.¹⁸

(a) Post at its facility in Elmira, New York, copies of the attached notice marked "Appendix."¹⁹ Copies of this notice on forms provided by the Regional Director for Region 3, shall, after being signed by Respondent, be posted by it immediately upon receipt and be maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

the date Respondent offers Price reinstatement. Backpay is to be computed according to the Board's formula as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁸ As noted in the remedy section of this decision, in the event the Board finds that Price was entitled to reinstatement as an unfair labor practice striker, the notice should be changed to include the following:

(a) Offer immediate reinstatement to James Price to his former position, discharging, if necessary, any employee hired to replace him, and make James Price whole for any loss of wages or benefits he may have suffered by virtue of our unlawful discrimination against him, with interest as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary or useful in complying with the terms of this Order.

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives all employees these rights.

- To organize themselves
- To form, join, or assist unions
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

In recognition of these rights we hereby notify our employees

WE WILL NOT coercively interrogate our employees about their union sympathies, activities, and affiliation.

WE WILL NOT threaten our employees with discharge if they speak with other employees about joining the Union at the Respondent's office or between the hours of 8 a.m. and 4:30 p.m., while maintaining no prohibition against other forms of communication or solicitation between employees at the office or at the times specified, and by not excluding lunchtime and breaktime from the prohibition.

WE WILL NOT threaten our employees with discharge if any union representative appears on the premises of any job on which we are performing work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

DEMUTH ELECTRIC, INC.